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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

REPLY TO BRIEFS FOR RESPONDENT AND AMICUS CURIAE IN OPPOSITION

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STATEMENT

Petitioner, The First National Bank of Chicago ("First National"), on July 9, 1976, filed with the Court its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("First National's Petition"). On August 10, 1976, Respondent, State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies, State of Illinois ("Commissioner"), filed a brief ("Commissioner's Brief") in opposition to First National's Petition.

On August 13, 1976, Independent Community Banks in Illinois ("ICBI") sought leave to file a brief ("ICBI's Brief") opposing the petition for a writ of certiorari filed in the related case of *Continental Illinois National Bank and Trust Company of Chicago* v. *State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies, State of Illinois* (No. 75-1900).* ICBI has requested the Court to consider its brief in conjunction with First National's petition as well.**

This brief replies to the Commissioner's Brief and ICBI's Brief.

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* The decision of the Court of Appeals is now reported at 536 F. 2d 176 (7th Cir. 1976).

** ICBI's Brief at 7.

ARGUMENT

I.

FIRST NATIONAL'S ARGUMENTS REGARDING ILLINOIS STATE BANKS' OPERATION OF OFF-PREMISES SYSTEMS RELATE TO THE IMPORTANT CONGRESSIONAL POLICY OF COMPETITIVE EQUALITY UNDERLYING THE McFADDEN ACT* AND NOT TO "NARROW STATE LAW ISSUES", AS THE COMMISSIONER CONTENDS.

The Commissioner's principal argument rests on the premise that First National's Petition "relies almost entirely on narrow state law issues".** This statement is inaccurate and misleading. First National submits that the uncontroverted evidence that the Commissioner's administrative policies favor off-premises systems for Illinois state banks bears decisively on the congressional policy of "competitive equality" underlying the McFadden Act (12 U.S.C. §36).

Fundamental to an appropriate construction of 12 U.S.C. §36 is careful consideration of the effect of that construction on the "competitive equality" of state and national banks in Illinois. Such consideration is not a "narrow state law issue", as the Commissioner has attempted to characterize it. If First National were to be prevented from operating its CBCT system, when the Commissioner

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* 12 U.S.C. §36.

** Commissioner's Brief at 2.

is permitting Illinois state banks to operate identical or analogous off-premises systems, the consequence would be the destruction of the "competitive equality" between state and national banks in Illinois which the McFadden Act was designed by Congress to assure.*

The Commissioner and ICBI assert that the Illinois state banks' off-premises systems discussed in First National's Petition at 7-9 were never expressly approved by the Commissioner. This patently misstates the record, which includes a ruling letter from the Commissioner's Chief Examiner in Chicago expressly authorizing one of the two off-premises systems discussed by First National in this case. Moreover, the Commissioner conceded, on deposition, that he agrees with that ruling letter.**

Further, the record conflicts with the Commissioner's assertion that the second off-premises system (Moneymatic 365) operated by certain Illinois state banks "has been monitored continuously by the Commissioner, and [that] action will be forthcoming as appropriate pending disposition of these matters." *** Neither the record herein nor any subsequent action by the Commissioner of which First National is aware indicates that the Commissioner has monitored continuously or plans to take any action with respect to this second off-premises system. The unrefuted fact is that both off-premises systems continue to operate to this day.

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* *See First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969) ("Plant City").

** Deposition of Richard K. Lignoul taken on October 14, 1975, at 23-24 (a part of the record in this case).

*** Commissioner's Brief at 2.

II.

THE LEADING CASES ON BRANCH BANKING ACKNOWLEDGE THE NECESSITY OF SCRUTINIZING ACTUAL STATE ADMINISTRATIVE PRACTICE IN ORDER TO PRESERVE "COMPETITIVE EQUALITY" UNDER THE McFADDEN ACT.

ICBI's Brief * at 14-15 argues that the Commissioner's administrative practice in permitting Illinois state banks to operate off-premises systems which are identical or functionally equivalent to First National's CBCT system does not support a decision that First National should be permitted to operate its CBCT system. Yet the opinion of the *IBAA** Court, on which ICBI and the Commissioner so heavily rely, plainly says that when state banks are permitted to operate off-premises systems by administrative practice, and not express state statute, a "narrow reading of [12 U.S.C.] section 36(c) would resurrect the precise form of competitive inequality which the McFadden Act was designed to cure." ** The *IBAA* Court goes on to state that in cases, such as the instant case, where the administrative practice plainly favors off-premises facilities, that Court would "refuse to frustrate legislative intent by a narrow reading of 12 U.S.C. §36(c)."***

The thrust of First National's Petition is that the *actual* administrative practice of the Commissioner must be considered in deciding whether the McFadden Act permits the operation of First National's CBCT system. The

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* *Independent Bankers' Assn. of America* v. *Smith*, 534 F.2d 921 (D.C. Cir., 1976) *("IBAA")*.

** 534 F.2d at 948 n. 104.

*** *Id.*

Court of Appeals, in failing to consider the Commissioner's *actual* administrative practice, places itself in direct conflict with the decisions of the District of Columbia Circuit in *IBAA* and of this Court in Plant City *, which also held that the McFadden Act must be construed so as not to "frustrate the congressional intent that there be competitive equality between state and national banks."

Finally, ICBI and the Commissioner argue that §5(11) of the Illinois Banking Act,** which grants to Illinois state banks all powers authorized to national banks under federal law, should not be considered in this case. Thus, ICBI argues that consideration of §5(11) would undermine the policy of the McFadden Act that state law is to be preeminent on the question of branch banking.*** First National submits that precisely the contrary is true. The consideration of §5(11) urged by First National in no way conflicts with the McFadden Act's policy, for §5(11) *is* a state law which assures that state banks will be permitted to operate off-premises CBCT systems if national banks in Illinois are permitted to do so. The Illinois policy that state banks shall always be on a competitive par with national banks obviously does not contravene the federal policy that state law is to be preeminent on the question of branch banking.

ICBI also argues that First National's interpretation of §5(11) is incorrect because §5(11) "authorizes state banks to perform only those acts *specifically authorized* to na-

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* *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969).

** Ill. Rev. Stat., 1975, Ch. 16½, §105(11).

*** ICBI's Brief at 16-17.

tional banks by an Act of Congress."* Aside from the fact that ICBI has inaccurately paraphrased the actual language of §5(11), this argument begs the central question in this case, *i.e.*, whether an Act of Congress, the McFadden Act, authorizes First National to operate off-premises CBCT's. That question should be answered only after the actual Illinois administrative practices and competitive situation (including the impact of §5(11) on competitive equality in the state) have been considered. The Court of Appeals below failed to consider these critical factors. Review by this Court is therefore appropriate.

CONCLUSION

For the foregoing reasons, First National respectfully submits that the Commissioner's Brief and ICBI's Brief do not effectively respond to the matters set forth in First National's Petition. First National respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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* ICBI's Brief at 16 (emphasis in text).